

Jan. 8, 2020

Kathleen Kraninger, Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, DC 20552

Re: Importance of applying TILA to PACE loans

Dear Director Kraninger,

The undersigned consumer organizations write to urge the Consumer Financial Protection Bureau to ensure that the upcoming proposed rule to implement Section 307 in the Economic Growth, Regulatory Relief, and Consumer Protection Act (Public Law 115-174) regarding Property Assessed Clean Energy (PACE) loans adheres to the content and purpose of Congress's directive and respects the limits on the Bureau's authority under the Truth in Lending Act (TILA) and other federal statutes. We also write to urge the Bureau to delay issuing a proposed rule until it has collected and analyzed PACE data, shared its findings with stakeholders and the public, and issued an updated ANPR that takes into account its findings.

While we have urged the Bureau to use its authority to issue a rule that applies all of TILA to PACE rather than limiting the rule to the statute's residential mortgage ability-to-repay provision, we write to emphasize that the Bureau does not have authority to exempt PACE loans from any aspect of TILA coverage. As discussed further below, under the terms of TILA itself, both with regard to the coverage of PACE as credit evidenced by Congress's amendment and in connection with the Bureau's limited exemption and exception authority, the scope of the Bureau's authority does not allow for such action. Carving PACE loans out of TILA's protections would constitute an arbitrary and capricious act.

Moreover, the process of submitting and discussing comments to the Bureau's ANPR has made clear that it would be premature to issue a proposed rule at this time. The Bureau is still in the process of collecting and analyzing data about the PACE industry and its impact on consumers, a process we support. Yet, without sharing those findings with stakeholders and the public, the Bureau cannot properly issue a proposed rule. As a data-driven agency, the Bureau should develop an additional ANPR to ensure that stakeholders and the public have had the opportunity to comment on its data findings before formulating a rule.

TILA clearly covers PACE loans.

When Congress amended TILA in 2018 to require the CFPB to issue regulations that would apply the existing TILA residential mortgage ability-to-repay standards to PACE loans, including by providing for the unique characteristics of PACE loans, the directive assumed TILA coverage. In fact, Congress's provision directly applied the residential mortgage ability-to-repay portion of the statute found in subsection (a) of section 1639c, as well as the remedy provisions

in section 1640, to PACE. Notably, Congress did not amend any definitions in section 1602 or other coverage provisions of the statute because PACE already meets the relevant definitions for coverage. TILA is a comprehensive statute that governs consumer credit and Congress's inclusion of PACE in TILA removes any doubt that PACE financing is a consumer credit transaction covered by TILA. As such, and based on Congress's specific inclusion of PACE in section 1639c, all provisions of TILA that apply to residential mortgage loans also apply to PACE.

The coverage of PACE as consumer credit and as a residential mortgage loan is discussed in detail in our ANPR comments. PACE is not exempt from TILA's credit purview despite its association with the tax system. Moreover, the legislative history of the PACE statutes in California, for example, further supports the conclusion that PACE is credit. While some industry actors have argued that PACE is not credit or is not otherwise covered by TILA, including the specious argument that PACE financing is not credit because it does not create personal liability, we have seen no actual statutory analysis or any basis in TILA to support such a conclusion.

TILA's exemption authority does not allow the Bureau to exempt PACE loans from any aspect of TILA.

Section 1604(f) lists factors for the Bureau's use of its exemption authority. The Bureau may exempt any class of transaction other than high cost mortgages where it determines coverage "does not provide a meaningful benefit to consumers in the form of useful information or protection." This authority is exceptionally narrow and applies only if the Bureau determines that the exemption directly affects the well-being of consumers. Exempting PACE from TILA provisions other than sections 1639c(a) and 1640 would prevent the application of key protections Congress intended to benefit consumers when they access credit products like PACE loans.

Congress set out in section 1604(f) specific factors the Bureau must consider in exercising its exemption authority. A closer look at several of these factors further emphasizes the Bureau's lack of authority to exempt PACE loans:

- Section 1604(f)(2)(A) requires the Bureau to consider "the amount of the loan and whether the disclosures, right of rescission, and other provisions provide a benefit to the consumers" The amount of PACE loans, whether considered either as the total loan amount secured by a lien on the consumer's home or as the monthly (if escrowed) or annual payment amount, is a significant consumer obligation that warrants application of TILA's protections. Moreover, industry participants have already recognized that many protections addressed in TILA, such as advance disclosures and the right of rescission, must be incorporated into PACE program guidelines. Thus, the Bureau could not possibly contend that these essential consumer protection components of TILA do not benefit consumers.
- Section 1604(f)(2)(C) highlights the status of the borrower, including any related financial arrangements of the borrower, the financial sophistication of the borrower, and

the relative importance of the form of credit itself as well as the role of the supporting property. With PACE, a homeowner's residence, the source of stability and the major source of personal wealth, is on the line. As many PACE borrowers also have forward or reverse mortgages on the property, these related financial transactions are impacted by PACE loans, particularly when borrowers have difficulty paying the annual PACE assessment in a lump sum or as an increased monthly escrow payment. Home contractors who market PACE loans often target homeowners who are not financially sophisticated. Misrepresentations made by contractors as to the cost and nature of PACE assessments also weigh heavily in favor of increased regulation, not exemption.

- Section 1604(f)(2)(D) explicitly mentions a loan secured by the principal residence as a consideration. Although PACE loans are more modest in size than purchase money mortgages, a default will nevertheless result in devastating losses. Moreover, the tax lien foreclosure process in most states provides fewer protections for homeowners than the mortgage foreclosure process. Where a person's home is at stake, the threshold for exempting a product from TILA's protections is extremely high. Exempting PACE loans from provisions that were clearly intended by Congress to protect consumers in credit transactions that are secured by the consumer's principal dwelling, such as the right of rescission under section 1635 or the ban on mandatory arbitration and waiver clauses in section 1639c(e), would be an improper exercise of the Bureau's exemption authority.
- Sections 1604(f)(2)(B) and 1604(f)(2)(E) refer to more general factors, but again these must be considered only to the extent they further protection of consumers. As this analysis does not involve a balancing of interests as between consumers and creditors, regulatory relief for industry participants is not relevant. Crucially, factor (2)(E) states that an exemption should be weighed against the question of whether the goal of consumer protection could be undermined by such an exemption. This factor highlights the essential issue in this matter. TILA's definitions and structure, as well as its legislative and regulatory history, make clear that PACE loans are subject to TILA's protections. Exempting these products from such core rules, especially when such an essential and vital personal asset is at stake, only undermines consumer protection. While one could argue that inclusion in TILA increases compliance costs and thus makes credit more expensive, a factor in (2)(B), it is always true that coverage implicates the work of compliance. This factor must be weighed against the question of whether there is a meaningful benefit to consumers in retaining TILA coverage. Here that connection is clear.

Finally, TILA's exemption provision as it applies to high cost loans also does not support exempting PACE from TILA. Section 1639(p) only allows the Bureau to exempt specific mortgage products or categories from certain high cost mortgage prohibitions if the Bureau finds the exemption would be both in the public interest and would apply to a product that strengthens homeownership. Preliminary results are clear: PACE often undermines stable homeownership especially for many low-income homeowners.

TILA's exemption provisions offer no leeway to those who would have the Bureau exempt PACE from the statute's coverage. The statutory factors the Bureau must consider compel the

Bureau to apply TILA's residential mortgage loan provisions to PACE. Relieving PACE creditors from the compliance obligations set out in TILA does not fall within the Bureau's exemption authority. As a result, such an exemption would be arbitrary and capricious.

TILA's exception authority does not allow the Bureau to make adjustments and exceptions to TILA provisions designed to protect borrowers in PACE loan transactions.

TILA section 1604(a) allows the Bureau to provide through regulation "additional requirements, classifications, differentiations, or other provisions," but only if "such adjustments and exceptions" for certain transactions are in the Bureau's judgment "necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith." Because TILA's purposes relate to enhancing consumer protection and understanding, so that borrowers will be assured meaningful disclosure of credit terms that will help them avoid the uninformed use of credit, removing PACE loans from the purview of TILA's provisions would run counter to this purpose by diminishing consumer protections. Any exercise of the section 1604(a) exception authority must be done with precision, by making only minor adjustments to existing provisions and leaving them otherwise intact, and only when absolutely necessary to enhance consumer protection. This analysis may be guided by Congress's directive to consider the unique nature of PACE financing. The default position of the Bureau, therefore, should be that all of the TILA provisions that apply to residential mortgages also apply to PACE without adjustment unless there is a compelling reason to provide additional requirements, classifications, or differentiations that would promote consumer protection, taking into consideration the unique nature of PACE financing.

For example, in applying the TILA/RESPA "Know Before You Owe" disclosures to PACE, the Bureau may provide for additional disclosures that are unique to PACE. This might include a disclosure about the superpriority status of the PACE assessment lien, and that enforcement of the lien upon default could result in the loss of the borrower's home. The disclosures might also state that the borrower may be required to pay additional penalty fees and interest, in addition to the note interest rate, if an assessment is paid late.

Issuing a proposed rule at this stage would be premature.

We applaud the Bureau's effort to examine available PACE data and to better understand the PACE market. Unfortunately, this work is still in process and is a necessary precursor to any proposed rule. This work has been made more difficult for the Bureau because of the incomplete and evasive responses to the ANPR by PACE industry participants. For example, in response to direct questions in the ANPR about PACE defaults and bond reserves, program administrators and PACE government sponsors failed to disclose that they have been deferring foreclosures on delinquent PACE assessments by advancing funds from PACE bond reserves to cover delinquent borrower payments. This is documented in the agenda of the October 7, 2019, meeting of the Western Riverside Council of Governments (WRCOG) Executive Committee, available at: <http://www.wrcog.cog.ca.us/AgendaCenter>.

As a result, it is essential that the Bureau delay any proposed rule until the staff have had the opportunity to examine the data, share those findings, and formulate proposals based on both the

data and the public's response to those data. As a data-driven agency, it is incumbent upon the Bureau to ensure that a rulemaking on such a crucial emerging topic has the benefit of considered analysis.

While we recognize the urgency of the Bureau's role in regulating PACE and its obligation to ensure that TILA's protections apply, this mission must be supported by the necessary analysis offered by recent data sources.

We look forward to working with the Bureau to ensure that PACE borrowers are able to avail themselves of strong, well-supported federal consumer protections.

Sincerely,

Americans for Financial Reform Education Fund
Bet Tzedek
California Low-Income Consumer Coalition
California Reinvestment Coalition
Center for NYC Neighborhoods
Center for Responsible Lending
Community Legal Services, Inc., of Philadelphia
Connecticut Fair Housing Center
Consumer Action
Consumer Federation of America
East Bay Community Law Center
Elder Law and Advocacy
Empire Justice Center
Florida Alliance for Consumer Protection
Housing and Economic Rights Advocates
Jacksonville Area Legal Aid, Inc.
Legal Aid Society of Southwest Ohio
Mountain State Justice
National Association of Consumer Advocates
National Community Stabilization Trust
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
National Housing Law Project
New Jersey Citizen Action
Ohio Poverty Law Center
Public Counsel
Public Law Center
Public Utility Law Project of New York
UC Irvine School of Law Consumer Law Clinic